Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-135 OF 1990
ABDUL HAMID OMAR LP, MOHAMED AZMI AND AJAIB SINGH SCJJ
2 MARCH 1991

Banking — Breach of agreement to provide end finance facility — Term of agreement that end finance facility to be used to settle loans — Damage caused by suspension

Contract — Breach — Agreement by bank to provide end finance facility — Facility suspended — Damage caused by suspension

In this case the appellants had early in 1980 granted overdraft and term loan facilities to the first respondent and two related companies of the first respondent and to the second respondent personally. By 1983 the said loan accounts had been substantially overdrawn and the then outstanding loan accounts were insufficiently secured. The respondents then provided a bank guarantee to secure a loan from a private investment company (PICA). The said loan was used, inter alia, to retire some of the existing loans of the first respondent and its related companies. The said loan was to repaid from an end finance facility granted by the bank to the first respondent and its related companies in their respective housing developments.

Early in 1984 the appellants in seeking to regularize and restructure the remainder of the said loan accounts granted the first respondent a bridging loan of $13.5m to retire the remainder of the loans given to the first respondent and its related companies. It was a term of the agreement that the repayment of the bridging loan was to have been from the end finance facility of $25m granted by the appellants to the first respondent. The respondents were relying on the end financing facility provided by the appellants to settle the loan. The appellants were therefore under an obligation to provide the end finance so that the respondents would be able to repay the loan. The end finance was to expire on 30 June 1985. However the appellants suspended the end finance around the middle of 1985.

The appellants brought an action in 1986 against the first respondent for moneys unpaid under the bridging loan and against the second to fourth respondents as guarantors. Summary judgment was granted, on appeal, by the judge-in-chambers. A further appeal to the Supreme Court was dismissed. The question of repayment from end financing was raised by the respondents in the appeal before the High Court but learned judge ruled that this was a matter for which the respondents may sue separately. The respondents thereupon brought an action for damages for breach of contract of the end financing facilities. The learned trial judge held that the repayment of the loan facilities was to come from the end finance and this was provided for under the terms of the end finance facility granted by the appellants to the first respondent. The learned judge gave judgment in favour of the respondents and ordered the appellants to pay the respondents damages for breach of contract to be assessed by the senior assistant registrar. The appellants appealed.

Held, by a majority, dismissing the appeal (Mohamed Azmi SCJ dissenting):

(1) The learned trial judge was correct in finding that the suspension of the end finance facilities constituted a breach of the agreement between the parties.

(2) As no evidence had been given as to the extent of the loss, if any, sustained by the respondents, the case would be remitted to the learned judge for the ascertainment of any loss suffered by the respondents.

[Bahasa Malaysia summary

Dalam kes ini pada awal 1980 perayu telah memberi overdraf dan kemudahan pinjaman bertempoh (term loan) kepada responden pertama dan dua syarikat yang berkaitan dengannya dan kepada responden kedua sendiri. Menjelang 1983 akaun pinjaman itu telah digunakan secara melebihi dengan banyak dan akaun pinjaman yang belum dibayar tidak mempunyai cagaran yang mencukupi. Responden kemudiannya telah memberi guaranti bank untuk mendapat pinjaman dari sebuah syarikat pelaburan swasta (PICA). Pinjaman itu telah digunakan, antara lain, untuk membayar balik hutang responden pertama dan syarikat yang berkaitan dengannya. Pinjaman itu akan dibayar dengan kemudahan pembiayaan projek (end financing) yang diberi oleh bank kepada responden pertama dan syarikat yang berkaitan dengannya di dalam projek kemajuan perumahan mereka.

Pada awal 1984 perayu dengan tujuan mengatur dan membentuk semula baki akaun hutang telah memberi kepada responden pertama pinjaman untuk mengatasi kesukaran (bridging loan) $13.5 juta untuk membayar balik baki pinjaman yang telah diberi kepada responden pertama dan syarikat-syarikat yang berkaitannya. Adalah menjadi syarat perjanjian itu bahawa bayaran balik pinjaman bridging itu hendaklah dibuat dari kemudahan pembiayaan project (end financing) $25 juta yang diberi oleh perayu kepada responden pertama. Responden bergantung kepada kemudahan pembiayaan project (end financing) yang diberi oleh perayu untuk menyelesaikan hutang itu. Perayu oleh kerana itu perlu memberi pembiayaan projek (end financing) itu untuk membolehkan responden membayar hutang itu. Tamatnya pembiayaan projek (end financing) itu ialah pada 30 Jun 1985. Akan tetapi responden telah menggantung pembiayaan itu pada pertengahan 1985.

Perayu telah mengambil tindakan pada tahun 1986 terhadap responden pertama atas pinjaman bridging itu dan terhadap responden kedua, ketiga dan keempat sebagai penjamin. Penghakiman terus telah diberi oleh hakim yang arif. Rayuan selanjutnya kepada Mahkamah Agung telah ditolak. Soal mengenai pembayaran dari pembiayaan projek (end financing) telah ditimbulkan pada masa rayuan di Mahkamah Tinggi akan tetapi yang arif hakim telah memutuskan perkara itu ialah perkara yang boleh diambil tindakan oleh responden berasingan. Responden kemudiannya telah membawa tuntutan untuk mendapat gantirugi kerana kemungkiran kontrak mengenai kemudahan pembiayaan projek (end financing) itu. Hakim yang arif yang membicarakan kes itu telah memutuskan bahawa pembayaran kemudahan hutang seharusnya dibuat dari pembiayaan projek (end financing) itu dan perkara itu telah diperuntukkan di bawah syarat-syarat pembiayaan end financing itu yang diberi oleh perayu kepada responden pertama. Hakim yang arif telah memberi penghakimannya kepada responden dan memerintahkan perayu membayar gantirugi kerana kemungkiran kontrak yang mana jumlahnya hendaklah ditaksir oleh penolong kanan pendaftar. Perayu telah membuat rayuan.

Diputuskan, oleh majoriti, menolak rayuan itu (Mohamed Azmi HMA bertentangan):

(1) Hakim yang arif itu telah betul memutuskan bahawa penggantungan kemudahan pembiayaan projek (end financing) itu merupakan kemungkiran perjanjian antara pihak-pihak itu.

(2) Oleh kerana tidak ada keterangan diberi mengenai jumlah kerugian (jika ada) yang dialami oleh responden-responden, kes itu hendaklah dihantar balik kepada yang arif hakim untuk ditaksirkan kerugian yang dialami oleh responden-responden.]

Cases referred to

1 *Leong Cheong Kweng Mines Ltd* v *Kok Hoong* [1962] MLJ 224 (refd)
2 *Chan Yee* v *Chan Yoke Fong* [1990] 3 MLJ 299; [1990] 1 SCR 469 (refd)

Appeal from: Civil Suit No D1-22-1541-1989 (High Court, Kuala Lumpur)

Vinayak Pradhan (*Shamsul Baharin* with him) for the appellants.
KS Narayanan for the respondents.

Cur Adv Vult

Abdul Hamid Omar LP: I have had the benefit of reading the judgments of Mohamed Azmi SCJ and that of Ajaib Singh SCJ in draft. With respect I am unable to agree with the conclusion reached by Mohamed Azmi SCJ but am inclined to agree with Ajaib Singh SCJ. It would appear clear to me that the question of repayment from end financing was raised by the defendant in an appeal before Harun J against the senior assistant registrar's decision. But the judge made a ruling that this was a matter of which the defendant may sue separately and they did.

I am also of the view that the question of suspension of the end financing was a question of fact which was properly dealt with by the learned judge and I see no reason why this court should interfere with the finding.

As Mohamed Azmi SCJ is delivering a dissenting judgment and the judgment of this court shall therefore be a majority judgment, this appeal is accordingly dismissed with costs here and in the court below.

However, I would also order that the case be remitted, not to the senior assistant registrar but to the learned judge himself for the ascertainment of any loss suffered by the plaintiffs/respondents and therefore to that extent the judge's order is varied.

Mohamed Azmi SCJ (delivering the dissenting judgment): This is an appeal by the appellant bank against the decision of Anuar J given on 22 March 1990 ordering the bank to pay the first respondent (the principal borrower) and the second, third and fourth respondents (the guarantors) damages for breach of contract of an end finance facility to be assessed by the senior assistant registrar.

The present appeal arose out of the same loan transaction which had apparently been canvassed before Harun J (as he then was) in Kuala Lumpur High Court Civil Suit No C 23-2831-86, and subsequently in Supreme Court Civil Appeal No 249 of 1988 (hereinafter referred to as '1988 appeal') before Lee Hun Hoe CJ (Borneo), Eussoffe Abdoolcader SCJ and Gunn Chit Tuan SCJ on 31 May 1989. In the 1988 appeal, the Supreme Court had upheld the decision of the High Court in granting summary judgment of $13.9m in favour of the bank against the present respondents, ie the principal borrower and the three guarantors under a bridging loan agreement. Both the bridging loan and the end finance facility have reference to the same two housing projects carried out by the respondents in Johore Bahru.

The effect of the concurrent finding of the High Court and the Supreme Court in the 1988 appeal was to reverse the decision of the senior assistant registrar in holding that there were triable issues in the dispute on both the bridging and end finance agreements. The senior assistant registrar had found, inter alia, that 'the entire transaction has to be investigated at trial by oral/documentary evidence in that '... (b) The bridging loan disbursement was not in the nature of a bridging loan .... (ii) The dispute relating to the end finance is a triable issue' (see pp 25 and 26 of the 1988 appeal record). In reversing the order of senior assistant registrar, clearly both the High Court and the Supreme Court were satisfied that there was no triable issue either on the bridging loan or the end finance. If there had been an issue to be tried on the liability of the bank on the alleged breach of the end finance facility, either the High Court or the Supreme Court or both would certainly have ordered a conditional or unconditional leave to defend to the principal borrower and guarantors. But in the notes of proceedings recorded by Harun J (as he then was), he did suggest vaguely that the question of repayment from the end finance 'is a matter they may sue separately'. This suggestion was never taken up seriously by the present respondents until their 1988 appeal was finally dismissed by the Supreme Court when they filed their present writ on 19 July 1989. In my view, the respondents' conduct was to be expected since they had already raised the issue of breach by the bank in their affidavit in opposition to the summary judgment before the senior assistant registrar and Harun J (as he then was) in the O 14 proceedings. Thus, in the affidavit affirmed on 9 April 1987 by Mdm Shirley YM Yam, the company secretary of the principal borrower, after raising the issue of repayment of the bridging loan from the end finance facility, it was deposed, inter alia, in para 5(2):

> I am advised and verily believe that this action by the plaintiff demanding the alleged outstanding sums from the defendants when the plaintiff itself is in breach of the terms of the bridging loan facility and in breach of the end facility granted is untenable, unconscionable and an abuse of the process of court. (See p 42 of 1988 appeal record.)

On the principle of res judicata, since both the High Court and the Supreme Court had finally determined

that there was no triable issue on the alleged breach of either the end finance or bridging loan agreement, the instant appeal by the bank ought to be allowed. In my opinion, notwithstanding any admission or concession now made by the bank on the suspension of the end finance, the question of breach of the end finance agreement should not be reopened and relitigated — see *Leong Cheong Kweng Mines Ltd* v *Kok Hoong*[1] at p 226.

More recently, the Supreme Court (Lee Hun Hoe CJ (Borneo), Harun Hashim SCJ and Ajaib Singh SCJ) unanimously held in *Chan Yee* v *Chan Yoke Fong*[2] at p 478 that the Supreme Court should not disregard an earlier decision of its own. Delivering a forceful judgment of the court, Lee Hun Hoe CJ (Borneo) ruled:

> If we are to accept the contention of the appellant it would necessarily make the proposition that it is open to this court to disregard an earlier decision of its own whenever it is made to appear that the court has not, on the earlier occasion, the benefit of the best argument that the researches and industry that counsel could provide. Such a proposition would open the floodgate to numerous and costly attempts to reopen questions which have been authoritatively decided.

It is also important to observe that in the instant appeal, there is no suggestion on the part of counsel for the respondents that the decision of the court in the 1988 appeal was tainted with any slip or error.

There is another reason why this appeal should succeed. It is common ground that the bank granted the first respondent a bridging loan on the guarantee of the second, third and fourth respondents to enable the first respondent to carry out its two housing projects in Johore Bahru, known as Taman Saleng II and Taman Nora II. On the other hand, the end finance facility agreement was arranged by the first respondent in the two housing estates, although under this agreement, the bank 'may' also allow the first respondent to utilize the facility for the purpose of repayment of the bridging loan. Thus, any unreasonable refusal by the bank to give loans to purchasers would be a breach because it would deny the respondents from benefitting from such loan for the purpose of repayment of the bridging loan. But there must surely be houses to be sold and there must also be purchasers who wish to avail themselves of such loans under the end financing facility. Otherwise, the whole substratum and basis of the respondents' claim to the use of the end finance facility would fail. These facts are made clear even in the preambles to both the end finance guarantee agreements dated 31 December 1984 between the first respondent and the bank (see p 139 of the appeal record), and between the second, third and fourth respondents and the bank (see p 158 of the appeal record). The second and third preambles to these agreements provide:

> At the request of the guarantors the bank has agreed to grant from time to time as and when approved by the bank various sums of money by way of end financing (hereinafter referred to as 'the said loan') to individual purchasers of the said houses from the guarantors who make applications therefor (which purchasers and all persons to whom the benefit of the bank's loans may be assigned by any of such purchasers are hereinafter referred to as 'the said borrowers' for the purpose of completing the respective purchases, the amount of such loans and method of advancement thereof to be at the absolute discretion of the bank and subject to the said borrowers executing a first legal charge over their respective lots as security for the said loans under s 242 of the National Land Code 1965 in the bank's standard form of charge (hereinafter referred to as the said charges) and subject to such terms, and conditions as the bank may from time to time require and subject to the terms and conditions hereinafter set out.
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> And whereas
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> The said loan requested are in varying amounts depending upon the needs of the purchasers but subject nevertheless to the sole discretion of the bank in granting the said loans and in any event the total of all the said loans shall not exceed dollars twenty-five million ($25,000,000) only for principal only.

In my opinion there is hardly any evidence before the learned trial judge as to the state of progress of the housing projects or the availability of houses to be sold. There is also no actual evidence of the existence of purchasers who are in need of housing loans and the respondents' counsel is equally unable to produce any such applications by anyone which the respondents have either received or forwarded to the bank on behalf of any purchaser for the end finance facility. It is pointless to deal with assessment of damages, where the loss has not been established. In my view there is no evidence to support the conclusion of the learned judge that 'The suspension of the end finance facilities to the plaintiffs had caused the plaintiffs to suffer great loss in that they were unable to service the loans.' It would appear that notwithstanding the complete draw-down of the bridging loan, both the housing projects had been abandoned and in the absence of documentary evidence of the existence of purchasers seeking for housing loans, there cannot be any loss suffered by the respondents under the end finance agreement. The bank's liability to release money from the end finance for whatever purpose must necessarily depend on the successful implementation of the two housing projects financed by the bridging loan. There can be no doubt that the bank is not bound under the contract to pump more money particularly for the purpose of servicing or repayment of the bridging loan when the housing projects have failed.

In my opinion, the learned judge erred in failing to take into account that the only express purpose of the $25m end finance facility is 'To assist the end-purchasers to complete the purchase' of properties at the two housing projects as contained in the first page of the bank's letter of approval dated 28 June 1984 (see p 124

of appeal record). It is only in item (g) under the heading of 'Others' at p 3 of the said letter that the following discretion is granted to the appellant:

> (g) The bank may also allow your company to utilize the end finance facility to settle the present bridging loan accorded and the offshore loan obtained from PICA. For this purpose, a special clearing account is to be opened to facilitate the said transaction.

Even if the suspension of the end finance agreement is established, it is necessary for the learned trial judge to consider whether there was an actionable breach having regard to the discretionary and ancillary nature of item (g), when considered in the light of the express purpose of the facility. Further, until the respondents' entitlement to any part of the end finance has been crystallized through the house purchasers, the respondents cannot be said to have suffered any loss as result of the suspension. It is only when such loss has been established that the trial court can proceed either by itself or be remitting the case the senior assistant registrar, to assess the quantum of damages payable. The condition precedent necessary to crystallize the respondents' entitlement to the end finance has not been proved, and mere refusal by the bank to exercise its discretion or mere intention to commit a breach of contract without actual breach against any purchaser for whose benefit the end financing facility was contracted is not actionable by the respondents. With respect, I am unable to agree as a matter of law for this case to be remitted to the lower court to enable the respondents to prove any actionable breach or loss. It is too late in the day to make such an order. To do so would in my opinion be tantamount to allowing the respondents to reopen and relitigate their claim.

For reasons stated, the claim of the respondents against the bank must fail. I would therefore allow this appeal and set aside the order of the learned judge. I would also order that the costs both here and in the court below be given to the appellant and the deposit should also be refunded.

Ajaib Singh SCJ: This is an appeal by Perwira Habib Bank Malaysia Bhd against the decision of Anuar J given on 22 March 1990.

The claim by the plaintiffs/respondents against the defendants/appellants was for damages for breach of contract and for an inquiry as to the extent of the damages. The brief facts of the case before the High Court as appear in the grounds of judgment of the learned judge are as follows.

Sometime in early 1980 the defendants granted overdraft and term loan facilities to the first plaintiff and two related companies of the first plaintiff Hong Huat Realty Sdn Bhd ('Realty') and Meldrum Holdings Sdn Bhd ('Meldrum') and to the second plaintiff personally. Each of them was given an overdraft and term loan facilities not exceeding $2m.

The said facilities were properly and sufficiently secured at the time it was granted in 1980. However in 1983 the situation was bad and the said loan accounts were substantially overdrawn. The then outstanding sum on the loan accounts was insufficiently secured. The plaintiffs were unable to secure any source of repayment or arrangements to clear the loan outstanding.

In the middle of 1983 the defendants in seeking to regularize and restructure some of the loan accounts provided a bank guarantee to the plaintiffs to secure a borrowing of $10m Swiss francs by the first plaintiff from a Private Investment Company for Asia, Singapore ('PICA'). The said loan was used, inter alia, to retire some of the existing loans of the first plaintiff and 'Realty'.

It was also a fact as adduced in evidence in court that the said loan was to be repaid from the end finance facility granted by the bank to the first plaintiff and 'Realty' in their respective housing developments.

In early 1984 the defendants in seeking to regularize and restructure the remainder of the said loan accounts granted the first plaintiff a bridging loan of $13.5m to retire the remainder of the loans given to the first plaintiff 'Realty' and 'Meldrum'. The said bridging loan was secured by charges on lands and personal guarantees given by the second, third and fourth plaintiffs.

It was the term of the agreement that the repayment of the bridging loan was to be from the end finance facility of $25m granted by the defendants to the first plaintiff. The end finance was given at the same time that the said bridging loan was given in respect of the houses to be built in the first plaintiff's housing development known as Taman Nora II and Taman Saleng II. The bridging loan of $13.5m was duly disbursed by the defendants and the moneys used to retire the existing loan accounts.

The defendants denied that there was an agreement that the repayment of the 'PICA' loan was to be from end finance facility granted by the defendants. However the defendants admitted that the repayment of the bridging loan of $13.5m was to be from end finance facilities granted by the defendants.

I would pause here to observe that this appeal is related to a claim made by the appellants against the respondents in Civil Suit No C23-2831-1986. In that case the appellants were the plaintiffs claiming as against the first defendant (first respondent in this appeal) a sum of $14,764,539.43 with interest accruing in respect of a bridging loan granted by the plaintiffs to the first defendant, and as against the second to fourth defendants as guarantors a sum up to a maximum of $13,500,000.

In the 1986 civil suit the plaintiffs applied by way of summons-in-chambers for summary judgment on 1 December 1986. On 10 April 1987 the senior assistant registrar dismissed the application. There was an appeal to the judge-in-chambers. In his grounds of judgment the senior assistant registrar had stated that one of the issues to be tried was the question of repayment which was to be in the form of end financing which was not provided due to internal problems in the bank. There was an appeal against the senior assistant registrar's decision.

At the hearing of the appeal before the learned judge on 13 April 1988 the senior assistant registrar's order was set aside and summary judgment was entered against the defendants. The question of repayment from end financing was raised by the defendants in the appeal but the learned judge ruled that this is a matter which the defendants may sue separately. Hence the institution of the 1988 civil suit (CS No D1-22-1541-1989), the subject of the present appeal.

It is reasonable to conclude that had the learned judge given the defendants unconditional leave to defend, the defendants would have in all probability raised in their defence a counterclaim and set-off.

I now turn to this appeal. The learned judge in the court below has stated that from the evidence before the court he had no doubt that the repayment for the loan facilities was to come from the end finance. This was provided for under the terms of the end finance facility granted by the defendants to the first plaintiff. It is clear he said that from the evidence the plaintiffs were relying on the end finance facility provided by the defendants to settle the loan. Without the end finance the plaintiffs would not be able to service the loan. The defendants were therefore under an obligation to provide the end finance so that the plaintiffs would be able to repay the loan. The end finance was to expire on 30 June 1985. However, before the expiry date of the facility, the defendants suspended the end finance around the middle of 1985. There was ample evidence before the judge, in particular having regard to the September 1985 letter from the bank which referred to the current suspension of the end financing, to conclude that the suspension was in fact made and that it was effected before the expiry period. The evidence shows that the suspension of the end finance was due to the defendant bank's internal problems and therefore they had no money to give the end finance facility. There was also a reorganization exercise taking place within the bank to remedy the problem that they were facing.

In their defence the defendants claimed that the end finance had actually expired and was not suspended. In the event they claimed that they were not obliged to offer the end finance. His Lordship did not agree with the contention. The evidence he said clearly showed that the end finance was suspended by the defendants and that the suspension was imposed as a result of the defendants' financial problems. The defendants cannot deny that they were in financial difficulty because the chairman of the bank in his statement admitted that the bank had incurred losses totalling more than $673m. The defendants conceded that the end finance facility was suspended. In addition the plaintiffs had also to pay additional interest on the existing loans. These losses were caused by the defendants' failure to honour their obligations. There is no doubt his Lordship said that the defendants had breached the contract by suspending the end finance facility.

I agree that the suspension of the end finance facilities constituted a breach of the agreement between the parties.

At the end of the trial the learned judge gave judgment in favour of the plaintiffs/respondents and ordered the defendants/appellants to pay the plaintiffs/respondents damage for breach of contract to be assessed by the senior assistant registrar.

With respect however I do not agree with the learned judge 'that the suspension of the end finance facility to the plaintiffs had caused the plaintiffs to suffer great loss in that they were unable to service the loan'. There was no evidence as to the extent of loss, if any, at this point of time. This will have to be proved by evidence.

In the event therefore I would dismiss the appeal with costs and order that the case be remitted not to the senior assistant registrar but to the learned judge himself for the ascertainment of any loss suffered by the plaintiffs/respondents.

Appeal dismissed.

Solicitors: *Skrine & Co; KS Narayanan Associates.*

Reported by *Prof Ahmad Ibrahim*